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The Case for the Extension of United States Extraterritorial Criminal Jurisdiction over Civilians Associated with the United States Military in Foreign Jurisdictions

# The Case for the Extension of United States Extraterritorial Criminal Jurisdiction over Civilians Associated with the United States Military in Foreign Jurisdictions

## PART I. INTRODUCTION

### A. Serious gaps historically existed in holding United States citizens accountable for their criminal actions in a foreign country when they are in the country because of their connection to the Department of Defense

United States military forces began the twentieth century with worldwide deployment in World War I, and have been stationed around the globe since that time.[1] From the beginning of worldwide deployment, civilians accompanied the active duty forces to some degree, but over the course of the twentieth century, the civilian presence with United States forces increased until the present when the active duty forces depend on civilian Department of Defense (DoD) employees and civilian contractors in large numbers.[2] As of March 31, 1996, over 96,000 civilian employees were stationed overseas.[3] Not only are the troops supplemented and supported with DoD employees and contractors, but in many locations around the world, active duty personnel are accompanied by their

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[1] According to the Department of Defense Almanac 1999 (DoD Almanac 1999), found at http://www.defenselink.mil/pubs/almanac/almanac/people, as of Sept 30, 1998, 116,666 active duty personnel serve in Europe, 89 in the Former Soviet Union, 95,680 serve in East Asia and the Pacific, 27,869 serve in North Africa, the Near East, and South Asia, 515 serve in Sub-Saharan Africa, 8,488 classified as "undistributed" in other places, and a total of 259,871 stationed in foreign countries.

[2] According to the DoD Almanac 1999, found at http://www.defenselink.mil/pubs/almanac/people, total active duty military strength was 1,406,830 as of Sept 30, 1998, while the number of Department of Defense civilians was 756,290.

[3] Statement of Senator Sessions, on the introduction of Senate Bill 768, 145 *Cong Rec S* 3634.

dependants.[4] Therefore, when the United States sends its military forces to foreign soil, the combined numbers of civilian DoD employees, contractors, and dependents exceed the numbers of active duty personnel on a worldwide basis.

Wherever military forces go, some degree of criminal activity occurs also. This is not unique to United States forces, as all nations must deal with crimes committed by a few of their military members, dependents and civilian employees and contractors at some time. In many instances, bilateral and multilateral treaties deal with the jurisdictional issues that arise when a military member of one nation commits a criminal offense while on foreign soil.[5] Other situations exist where the United States deploys forces to a foreign state rapidly where no formal agreement exists to deal with issues such as criminal jurisdiction over the forces of the sending state. Whether agreements are in place or not, a problem exists in addressing the crimes of these civilians when their crimes are solely against the United States, its assets, and its military or civilian population. While treaties and SOFAs may call for the foreign state to exercise criminal jurisdiction over United States civilians, many states are reluctant to prosecute crimes by foreign nationals against the United States or its personnel. The host government sees no national interest, for example, in prosecuting a United States military dependent for an assault against another United States dependent or active duty person. The host

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[4] According to the DoD Almanac 1999, as of March 31, 1999, active duty military dependents were distributed as follows: Total in Europe, 142,888; Former Soviet Union, 78; East Asia & Pacific, 51,879; North Africa, Near East, & South Asia, 975; Sub-Saharan Africa, 169; Western Hemisphere, 5,128; Total in all foreign countries, 202,235; total in the United States and its Territories, 1,785,438; total worldwide 1,987,673. Found at http://web1.whs.osd.mil/mmid/pubs.htm>-March 31, 1999 (PDF File 56Kb) <http://web1.whs.osd.mil/mmid/m05/m05mar99.pdf

[5] For example, the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), ratified by the United States in 1953, addresses the issue of criminal jurisdiction in Article VII.

government legitimately may ask why it should use its finances, prosecutors, and judicial system to address a matter that has not affected its citizens or state security interests in any way. Illustrative of this problem are the comments of Senator DeWine who co- sponsored Senate Bill 768 in 1999. In his comments to introduce the bill in the Senate, Senator DeWine described the case of the McGough family as representative of why legislation is needed to extend United States criminal jurisdiction to American civilians abroad. The McGough's were an active duty Army family stationed in Germany. Their 8-year-old son and 5-year-old daughter were raped and molested by another military dependent that was babysitting the children. Senator DeWine related that the Army investigative agency found sufficient evidence to prosecute the alleged molester, but ultimately the individual was not prosecuted because neither the Army nor Federal prosecutors had jurisdiction to prosecute under United States law, and the German government declined to prosecute because of the alleged perpetrator's age.[6]

When host country governments decline to prosecute DoD associated American civilians due to a lack of interest or an inability to prosecute under their own law, potentially serious crimes against the United States and its citizens in a foreign state currently go unpunished, because United States law generally provides no criminal jurisdiction to prosecute these crimes. The result can be devastating to the morale of the American military forces and their associated civilians and dependents. Active duty personnel can be and are regularly prosecuted for their crimes under the Uniform Code of Military Justice, but if military members perceive a double standard in regard to the crimes of civilians,

[6] Statement of Senator DeWine, on the introduction of Senate Bill 768, 145 *Cong Rec S* 3634

morale and discipline can suffer. Another obvious result is the lack of deterrence to crime committed by civilians, who recognize that they will not be held accountable for these extraterritorial crimes against fellow Americans and United States interests. A 1979 Government Accounting Office (GAO) report identified two serious problems that result from a lack of United States jurisdiction over DoD civilians. First, if a host country does exercise jurisdiction over DoD civilians, American citizens may find that foreign judicial systems do not provide the due process guarantees and rights that the United States Constitution provides; and second, individuals guilty of serious crime may not be held accountable if the host nation does not exercise jurisdiction.[7]

To correct this jurisdictional problem, a bill known as Senate Bill 768, the Military and Extraterritorial Jurisdiction Act of 1999, was proposed in 1999 in the United States Senate. The proposed legislation provided for the extension of United States extraterritorial criminal jurisdiction over civilians associated with the Department of Defense (DoD) abroad. The bill covered civilians who are in a foreign country because of their role with the Department of Defense and other government agencies, including employees, dependants, contractors, and foreign nationals working for the United States. This study of the merits of the legislation considers the proposal in light of principles of international law, legislation, treaties, Status of Forces Agreements (SOFAs), the Uniform Code of Military Justice (UCMJ), and case law.

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[7] General Accounting Office, *Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation Is Needed,* GAO Report No. FPCD 79-45 (1979).

**B. Description of the original proposed legislation in the United States Senate to eliminate two gaps of criminal accountability (Senate Bill 768)**

Senate Bill 768 recognized the jurisdictional problems associated with DoD civilian crime and made several findings. Among the findings in the bill are that misconduct by DoD civilians "undermines good order and discipline in the Armed Forces, and jeopardizes the mission of the contingency operation," and that "[m]isconduct among such civilians has been a longstanding problem for military commanders and other United States officials in foreign countries, and threatens United States citizens, United States property, and United States relations with host countries."[8] The bill found two potential "jurisdictional gaps" that should be filled. The first is the inability of commanders to act under military law during contingency operations to address, punish and deter criminal misconduct by DoD civilian employees and contractors who serve directly with the military in the field. The second gap is the lack of federal criminal law to apply to many offenses committed by DoD civilian dependents, employees and contractors accompanying military forces overseas in peacetime.[9] The bill proposed legislation to address these two identified jurisdictional gaps.

1. Section 3 of the bill would have amended Article 2(a) of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. 802) by extending court-martial jurisdiction coverage to include civilians serving with the armed forces during Secretary of Defense (SecDef) designated contingency operations under 10 USC

[8] 1999 S. 768; 106 S. 768
[9] *Id.* at Section 2.

§101(a)(13)(A), in places outside the United States specified by the SecDef.[10] The new provision for jurisdiction would have included not only "employees of the department of defense" but also "employees of any department of defense contractor who are so serving in connection with the performance of a department of defense contract."[11]

2. The bill also extended federal Article III courts coverage to try offenses committed by civilians accompanying the armed forces overseas.[12] Section 4 of the bill called for amending Title 18 of the United States Code by adding chapter 212, providing for the prosecution of criminal offenses "committed outside the United States by persons formerly serving with, or presently employed by or accompanying, the armed forces outside the United States."[13] Included in this coverage are dependents of military members, civilian employees of the military or DoD and their dependents, DoD contractors and their dependents, and employees of a DoD contractor and the employee's dependents, as well as civilians residing with the above stated persons. Covered criminal offenses are those that "would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States."[14]

[10] *Id.* at Section 3.
[11] *Id.*
[12] *Id.* at Section 4.
[13] *Id.*
[14] *Id.*

## PART II. EXISTING LAW AND ITS HISTORICAL DEVELOPMENT OF MILITARY JURISDICTION OVER CIVILIANS

### A. Historical application of court-martial jurisdiction over civilians accompanying the military

The uninformed person may think that the concept of military criminal jurisdiction over civilians is a new concept, and that legislative initiatives such as SB 768, federal statutes and UCMJ provisions providing jurisdiction over extraterritorial civilian crime have not been contemplated in the past. But such is not the case. America's history began with military jurisdiction over certain civilian crimes.

The Articles of War were the original statutory regulations governing the conduct of the American Revolutionary Army, and contained the criminal code for the Army. The Articles were "enacted by Congress in the exercise of the constitutional power 'to make rules for the government and regulation of the land forces.' In their origin, however, a majority of these Articles considerably pre-date the Constitution, being derived from those adopted by the Continental Congress between 1775 and 1786, which were themselves taken from pre-existing British articles...."[15] The first Articles of War were created by Resolution of the Congress in 1775. The Code of 1776 revised the 1775 Articles, and the Articles of 1776 remained in force until amendment once again in 1786.[16] "After the adoption of the Constitution, the Articles in force at that date were, by the First

[15] William Winthrop, Military Law and Precedents, 2nd Edition, 1920, page 17
[16] *Id.* at 22.

Congress, in an enactment of September 29, 1789...expressly recognized and made to apply to the existing army."[17] This code remained in effect until a new code was enacted in 1806.[18] The 101 Articles of the Code of 1806 remained in effect until the Code's revision in 1874, when the Articles grew in number to 128.[19] Of importance to this discussion of early American military justice and the application of the Articles of War is just who was subject to courts-martial under the Code. While the Articles of War of 1775 speak repeatedly of their application to officers, non-commissioned officers and soldiers, Article XXXII states, "All suttlers and retailers to a camp, and all persons whatsoever serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army."[20] The 1776 Articles went even further, stating, "All suttlers and retailers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war."[21] Another reference in the 1776 Articles states that "any commissary who shall be convicted of having taken money, or any other thing...shall be displaced from his office" and disqualified from further government employment.[22] These provisions in the Articles of War in the infancy of this nation show that the Articles of War were considered broad enough to allow for the court-martial not only of military officers and soldiers, but also civilians who were present in a

[17] *Id.* at 23.
[18] *Id.*
[19] *Id.*
[20] Articles of War (1775), Article XXXII, in 2 Winthrop at 956.
[21] Articles of War (1776), Article XXXIII, in 2 Winthrop at 967.
[22] *Id.*, Article VI, at 963.

camp for some reason, and other non-military individuals serving with the military.

The 1916 Articles of War granted jurisdiction over civilians accompanying forces overseas and added jurisdiction during time of war over all "persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States."[23] The UCMJ replaced the Articles of War in 1950 and Article 2(a)(11) of the new code granted the military jurisdiction over civilians who accompanied the military forces overseas.[24] The UCMJ continues to provide for military jurisdiction over civilians in Article 2(a)(10) which grants jurisdiction over civilians accompanying forces in time of war, and Article 2(a)(11) which grants jurisdiction over accompanying civilians outside the United States, subject to any treaty or other agreement. The latter provision has no "time of war" requirement for such jurisdiction.[25] Article 2(a)(11) is also known as the Crowder Article, and is discussed in more detail later in this article.

In practice, American history is replete with examples where civilians have been court-martialed for offenses and their convictions have been upheld by the Supreme Court. *Ex parte Reed*[26] and *Johnson v. Sayre*[27] both involved the courts-martial of paymasters' clerks in the Navy. In the first case, Reed was stationed on

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[23] Articles Of War, Art. 2(d) (1916).
[24] UCMJ art. 2(a)(11) (1950).
[25] UCMJ art. 2(a)(10) and (11) (1998) state that the following are subject to UCMJ jurisdiction: (10) In time of war, persons serving with or accompanying an armed force in the field. (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
[26] 100 U.S. 13 (1879)
[27] 158 U.S. 109 (1895)

the USS Essex off the coast of Brazil. The Court looked at several factors in upholding Reed's court-martial conviction, including his position and the agreement in place. Although Reed was neither an officer nor enlisted, the Court examined his position in the Navy and stated that if Navy paymasters "are not in the naval service, it may well be asked who are."[28] Also of importance to the Court was the fact that Reed had signed an agreement stating he was subject to Navy regulations and discipline.[29] Two years later a federal court in *Ex parte* Henderson overturned a court-martial conviction of a supply contractor for insufficient ties to the Army, but still upheld the concept of military criminal jurisdiction over civilians who may "serve with the armies in the field."[30] The idea that the Articles of War and American practice provided for military criminal jurisdiction over civilians who accompanied the forces in the field was generally widely accepted.[31]

As America moved into the twentieth century, the World Wars also brought several situations in which civilians who accompanied military forces were tried by courts-martial.[32] 1916 also brought an expansion of military jurisdiction in what was known as the Crowder Article to the Articles of War, mentioned earlier. The Article was named after Major General Enoch Crowder, who was the Judge

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[28] *Reed*, *supra* note 26, at 22.
[29] *Id.*
[30] 11 F. Cas. 1067 (D. Ky. 1878) (No. 6349).
[31] Additional examples of courts-martial of civilians accompanying the military forces in the field is detailed in Girard, The Constitution and Court-Martial of Civilians Accompanying the Armed Forces – A Preliminary Analysis, 13 Stan. L. Rev. 461,468 (1961). Girard details a court-martial in 1780 of a wagon driver for embezzlement; court-martial of a commissary for theft; court-martial of a clothier in Maryland for the improper way in which he distributed the cloth.
[32] For example, Hines v. Mikell, 259 F. 28 (4th Cir.), cert. Denied, 250 U.S. 645 (1919), affirming the court-martial of a civilian auditor in South Carolina, finding that he was serving in the field; *Ex Parte* Jochen, 257 F. 200 (S.D. Tex. 1919); *Ex Parte* Falls, 251 F. 415 (D.N.J. 1918), allowing the court-martial of a civilian ship's cook; *Ex Parte* Gerlach, 247 F. 616 (S.D.N.Y. 1917).

Advocate General of the Army at the time, and provided for military jurisdiction over "retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States."[33] The Crowder Article is also the predecessor of the modern Article 2(a)(11), UCMJ. The Article was based on two widely held legal assumptions at the time. The first was that the language of the Fifth Amendment to the United States Constitution which required indictment by grand jury "except in cases arising in the land or naval forces" actually referred to the geographical situs of the crime and that a civilian who was accompanying the forces when a crime was committed would be located "in the land or naval forces" at the time.[34] This then meant that there was no right to indictment by grand jury if the offense was committed by a civilian accompanying the military forces. General Crowder's second assumption, in which he was not alone,[35] was that constitutional rights and protections did not apply to Americans outside the United States.[36] The *Jochen* case[37] is typical in its application of the Crowder Article and of military jurisdiction over civilians in the early twentieth century. Jochen was an Army quartermaster stationed in Texas with a unit patrolling the border between the United States and Mexico. The court upheld military jurisdiction over Jochen because he was serving with the military forces in the field during time of war and, therefore, the Fifth Amendment right to a trial by jury did not apply to

[33] Art. 2(d), Articles of War, 10 U.S.C. §1473(d) (1920) (repealed 1956).
[34] U.S. Const. Amend. V.
[35] *See* Ross, 140 U.S. 453 (1891), for language supporting this position.
[36] F. Wiener, Civilians Under Military Justice app. IV, at 228 (1967).
[37] *Supra* note 32.

members of the military forces. The court included persons accompanying the land and naval forces in its definition of land forces.[38]

The deployment of civilians with the forces during World War II saw a continuation of the assertion of military jurisdiction over civilians accompanying the forces in the field. The case of Frances Berue illustrates the continued use of military jurisdiction during the War.[39] Berue was a merchant seaman employed on a merchant vessel that was owned by the United States. Pursuant to a union agreement, Berue was hired as a messman on the ship. Despite his civilian status, he was court-martialed for his actions while on-board the vessel that was transporting military supplies. The court found that he was accompanying the forces in the field, and was amenable to court-martial. Numerous other cases illustrate the military's continued use of criminal jurisdiction over civilians.[40]

**B. Notion of Constitutional rights as applied to Americans abroad**

Based on the assumptions which supported the Crowder Article mentioned earlier – that the Fifth Amendment did not apply when civilians accompanied the forces in the field, and that constitutional rights stopped at the United States' borders – Congress had extended courts-martial jurisdiction over civilians accompanying the forces during times of peace as well as war. However, the

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[38] *Id.* At 204.

[39] *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944).

[40] Examples of World War II cases include the following: McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943), allowing the court-martial of a ship's cook despite his lack of knowledge that he was subject to military jurisdiction; *In re* Di Bartolo, 50 F. Supp. 929 (S.D. N.Y. 1943), in which Mr. Di Bartolo, a contract employee of Douglas Aircraft Company, Inc., was a mechanic hired to maintain equipment at an aircraft depot in Eritrea. He was court-martialed for theft of a diamond ring, and his court-martial was upheld, with jurisdiction being found under Article of War 2, "in that he was a person "accompanying or serving with the Armies of the United States in the field".

many civilian courts-martial that occurred in the first half of the twentieth century, as cited earlier, had occurred during the time of war, and the military's jurisdiction during peacetime was not really tested. But beginning in the 1930s, the Supreme Court began to dismantle the assumption that American citizens forfeited their constitutional rights when they left American soil. In 1936, in *United States v. Curtiss-Wright Export Corp.*,[41] the Supreme Court endorsed the notion of the President's legitimate and independent foreign affairs powers regardless of any legislative powers that Congress may or may not delegate to him. The case involved a Congressional resolution that delegated power to the President to outlaw and essentially criminalize gun sales outside United States territory in the Chaco region. The Court found that the President was legitimately exercising his foreign affairs powers as only he can do as the representative of the United States to foreign powers, and that a President's foreign affairs powers do not derive from the Constitution, but from the sovereignty of a state. For the discussions here, however, the case stands for another principle also – that the exercise of foreign affairs abroad does not involve Constitutional rights and protections except as it involves American citizens.[42] One year later in *U.S. v. Belmont*[43] the Court dealt with the issue of Presidential authority to negotiate and agree to settle mutual claims between the United States and other governments, pursuant to foreign affairs powers, without the consent of Congress. In upholding the President's foreign affairs powers in this regard, the Court addressed the limits that the Constitution places on the taking of private property without

[41] United States v. Curtiss -Wright Export Corp., 299 U.S. 304 (1936).
[42] *Id.* at 318.
[43] United States v. Belmont, 301 U.S. 324 (1937).

compensation, and stated that "our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens."[44] Six years later the Supreme Court reiterated its decision in *Belmont* that citizens still enjoy their constitutional rights overseas.[45] No real argument now exists that constitutional rights do in fact follow United States citizens beyond the nation's borders.[46]

### C. Application of Article 2(a)(11) of the UCMJ During Peacetime

Article 2(a)(11) of the UCMJ was soon tested to determine if civilians accompanying the forces overseas during peacetime were truly subject to the Code, as asserted by Article 2(a)(11), and whether there was a right to trial by jury in the military courts-martial of civilians who accompany the forces. *Kinsella v. Krueger*[47] and *Reid v. Covert*[48] were companion cases involving the courts-martial of military dependents. *Reid v. Covert,* decided in June of 1957, consolidated the cases of both *Kinsella v. Krueger* and the *Covert.* A somewhat lengthy discussion of both cases and their history is useful here to understand why extraterritorial criminal jurisdiction is a problem today and to analyze the constitutional issues of the proposed legislation to impose criminal jurisdiction over DoD associated civilians abroad.

Both cases involved the murder of active duty military members by their respective dependent civilian wives. In *Kinsella,* Mrs. Dorothy Smith was tried

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[44] *Id.* at 332.
[45] United States v. Pink, 315 U.S. 203, 226 (1942).
[46] Restatement (Third) of Foreign Relations Law of the United States § 422 commentary at 314 - 315 (1987).
[47] 351 U.S. 470 (1956).
[48] 354 U.S. 1 (1957).

and convicted by an Army court-martial for murdering her officer husband while they were stationed and living in Japan. The court sentenced her to life imprisonment.[49] Mrs. Smith's father filed a petition for habeas corpus in District Court alleging that military jurisdiction over civilian dependents as provided in Article 2(a)(11) of the UCMJ was unconstitutional. Although the writ was not issued, and the case was appealed to the Fourth Circuit, the Supreme Court granted certiorari.[50] In *Covert*, Mrs. Clarice Covert was tried by court-martial in England for murdering her active duty Air Force husband. Mrs. Covert, who was a dependent civilian, was in England because of her husband's Air Force status, and resided on a United States air base in England where the murder occurred. Like *Kinsella*, court-martial jurisdiction was based on Article 2(a)(11) of the UCMJ.[51] After Mrs. Covert was convicted and sentenced to life in prison, the District Court issued a writ of habeas corpus for her release based on its understanding that *United States ex rel. Toth v. Quarles*[52] held that civilians cannot be tried by military tribunal.[53] The Supreme Court agreed to hear the case pursuant to a government appeal. The events that followed revealed both an unsettled legal foundation and contentiousness among the Justices regarding the constitutionality of military extraterritorial jurisdiction over DoD associated civilians. The Court considered the issue twice, and arrived at dramatically different determinations each time. The original court, in *Kinsella, Warden, v. Krueger*, considered the case of Mrs. Smith's petition for a writ of habeas corpus.

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[49] *Id.* at 4.
[50] *Id.* at 4,5.
[51] *Id.* at 3.
[52] 350 U.S. 11.
[53] *Supra* note 51, at 4.

In an opinion written by Justice Clark and joined by Justices Reed, Burton, Minton and Harlan, the court found Article 2 (11) of the UCMJ (the predecessor of the current Article 2(a)(11)) constitutional, and that the court-martial had jurisdiction.[54] Chief Justice Warren and Justices Black and Douglas dissented, with Justice Frankfurter reserving. The question for the majority was not whether constitutional rights extend beyond the borders of the United States, for the Court said such application of the Constitution is "self-evident."[55] The first question was "whether, as a matter of constitutional right, an American citizen outside of the continental limits of the United States and in a foreign country is entitled to trial before an Article III court for an offense committed in that country."[56] The Court found this an essential inquiry because it said that although the UCMJ included "the fundamental guarantees of due process, courts-martial are not required to provide all the protections of constitutional courts; therefore, to try by court-martial a civilian entitled to trial in an Article III court is a violation of the Constitution."[57] What the Court found was that it was "well-established...that Congress may establish legislative courts outside the territorial limits of the United States proper"[58] and that the standards for these courts may deviate from the constitutional requirements of Article III courts.[59] Regarding the Constitution's jury requirement provisions, the majority said it was "clearly settled" by 1922 that such requirements do not apply in unincorporated United

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[54] Kinsella, Warden, v. Krueger, 351 U.S. 470 (1956).
[55] *Id.* at 474.
[56] *Id.*
[57] *Id.*
[58] *Citing* American Insurance Co. v. Carter, 1 Pet. 511, as the source of the principle.
[59] *Supra* note 57, at 475.

States territory.[60] The majority also proffered public policy reasons to uphold military jurisdiction over civilians abroad. One of these was that Congress would be reasonable in determining that equality under the law between civilians and active duty members was necessary overseas, or else the "effect of a double standard might well create sufficient unrest and confusion to result in the destruction of effective law enforcement."[61] The second was based on the principle of a nation's sovereign jurisdiction over its own territory as set out in *Schooner Exchange v. McFaddon*[62], and that unless the foreign state releases jurisdiction to the United States and the United States exercises such jurisdiction over its nationals abroad, Americans will be tried in foreign courts. The Court opined that in view of this, "Congress may well have determined that trial before an American court-martial in which the fundamentals of due process are assured was preferable to leaving American servicemen and their dependents throughout the world subject to widely varying standards of justice unfamiliar to our people."[63]

*Kinsella v. Krueger's* decision upholding military jurisdiction over civilians during peacetime was not to stand for long however, for in the next term the Court considered the issue anew in *Reid v. Covert*, which not only considered Dorothy Smith's case again, but also considered Mrs. Clarice Covert's case. This time the Court came to a completely different conclusion than it did in the previous year, and not due to a change in law, but due to a change in the composition of the

[60] *Id.*, *citing* Balza v. Porto Rico, 258 U.S. 298.
[61] *Id.* at 477.
[62] 7 Cranch 116, (1812).
[63] *Supra* note 61 at 479.

Court and hence a change in the interpretation of existing law. Justice Black, writing for the plurality, was joined by Chief Justice Warren, Justice Douglas and Justice Brennan, and said that civilians accompanying United States forces overseas cannot be court-martialed in time of peace notwithstanding Article 2 (11) of the UCMJ. Justices Frankfurter and Harlan concurred in the result when applying court-martial jurisdiction to civilians in capital cases in time of peace. Justices Burton and Clark dissented and Justice Whittaker took no part in the case. The difference from the previous term was the departure of Justices Reed and Minton, while Justices Brennan and Whittaker joined the court.

The *Reid* Court began by saying that United States citizens overseas retain all of the protections of the Bill of Rights with regard to actions of the United States government.[64] Thus, Americans abroad continue to possess the guarantees of Article III, § 2 and of the Fifth and Sixth Amendments to the Constitution. These provisions read as follow:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by Law have directed." Art. III, § 2, U.S. Const.

[64] 354 U.S. 1 at 5.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger;...." Fifth Amend., U.S. Const.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." Sixth Amend., U.S. Const.

Justice Black wrote that the language of Article III, § 2 made the jury requirement apply to all criminal trials, whether outside the country or at home, by clear and unambiguous language. "All crimes" meant exactly that – all crimes.[65]

The Court also discussed the fact that in both cases, executive agreements existed between the United States and Great Britain, and the United States and Japan, agreeing that United States citizens who violated host nation law would be prosecuted in United States military courts. In answer to the Government's contention "that Art. 2 (11) of the UCMJ...can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries", the Court said "[t]he obvious and decisive answer to this, of course, is that no agreement with a foreign

[65] *Id.* at 7, 8.

nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[66] The authority for the Court's statement is the Supremacy Clause in Article VI of the Constitution, which states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;...."

Thus, neither treaty, executive agreement, nor law can contravene the Constitution. After the Court determined that military courts-martial failed to satisfy the jury requirements of Article III, § 2, the Fifth Amendment and the Sixth Amendment, it turned to the Government's contention that the Necessary and Proper Clause of the Constitution[67] coupled with Clause 14[68] permits courts-martial of civilians.[69] It answered this assertion of Congressional power by saying that while Congress does indeed have the power to make the necessary and proper rules to govern the military forces, "the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that

[66] *Id.* at 16.
[67] Article I, § 8, U.S. Const., which declares that the Congress shall have the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."
[68] Article I, § 8, Clause 14, U.S. Const., declares that the Congress shall have the power "To make Rules for the Government and Regulation of the land and naval Forces."
[69] *Supra* note 66 at 20.

class described in Clause 14 –'the land and naval forces'."[70] The Court went on to say that, "Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14."[71] In the end, the Court embraced a statement by Colonel William Winthrop and thereby seemingly cast a long shadow over the history that would follow the Court's decision in *Reid* – that "...a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."[72] Finally, the Court opined that "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts,"[73] and in making its declaration, it helped to chill the possibility that legislators would in the future attempt to draft legislation giving military tribunals jurisdiction over civilians in time of peace.

**D. Application of Art 2(a)(11) to civilian employees and dependents in peacetime after *Reid v. Covert***

A few years after *Reid v. Covert* the Court further addressed the constitutionality of courts-martial of civilians in the companion cases of *McElroy v. United States,*[74] *Grisham v. Hagan,*[75] and *Kinsella v. Singleton.*[76] Given the division of opinion among the Justices in *Covert*, and the fact that civilian crime

[70] *Id.* at 20, 21.
[71] *Id.* at 21.
[72] Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 107, quoted at *supra* note 71 at 35.
[73] *Supra* note 21 at39, *quoting* United States ex rel. Toth v. Quarles, 350 U.S. 11, 17.
[74] 361 U.S. 281 (1960).
[75] 361 U.S. 278 (1960).
[76] 361 U.S. 234 (1960).

remained a problem for the military, further development of the extent of jurisdiction over civilians abroad was inevitable. Of the eight participating Justices in *Reid v. Covert*, the two dissenters believed military jurisdiction over civilians was necessary and proper; four believed military jurisdiction was always contrary to fundamental concepts of due process under the Constitution, and two Justices limited their concurrence to capital cases. Unlike *Reid v. Covert*, *McElroy* involved two noncapital and civilian employee cases – an Air Force civilian employed as an electrical lineman convicted by court-martial in Morocco for larceny, and an Army civilian employed as an auditor court-martialed and convicted in Berlin for the crime of sodomy.[77] *Grisham* involved the capital case of a civilian Army employee at an installation in France convicted in a court-martial for murder. Although he was ultimately convicted of a lesser-included offense of unpremeditated murder, the accused was charged and tried for the capital offense of premeditated murder.[78] *Kinsella v. Singleton* was the case of an Army soldier's dependent wife who was charged in Germany for the unpremeditated murder of one of her three children who resided with the family in base housing. In a military court-martial, both the dependent wife and her active duty husband plead guilty and were convicted for the noncapital offense of involuntary manslaughter.[79] These cases completely eviscerated any military courts-martial jurisdiction over civilians in peacetime – regardless of civilian status as employee or dependent, and regardless of capital or non-capital crime. The *Grisham* court found the principles of *Covert* controlling, and that civilian

[77] *Supra* note 74 at 3.
[78] *Supra* note 75 at 279.
[79] *Supra* note 76 at 235-236.

employees had the same constitutional rights in an extraterritorial setting, such as those under Article III and the Fifth and Sixth Amendments, as civilian dependents have.[80] Thus, the Court found that "[c]ontinued adherence to *Covert* requires civilian employees to be afforded the same right of trial by jury" because there are no "valid distinctions between the two classes of persons."[81] In *McElroy,* the Court ruled that the military had no jurisdiction over the civilian employed as an electrical lineman, differentiating the case from prior cases where civilians were court-martialed. It said that prosecutions during the Revolutionary Period were during a period of war,[82] and therefore distinguishable. Furthermore, in two previous cases[83] where civilian paymaster's clerks were prosecuted by the military, three factors present in those cases were found lacking here. First, the paymaster's clerk was in an important position essential to the Navy's operations; second, the clerks agreed in writing to the jurisdiction of the Navy; third, "from time immemorial the law of the sea has placed the power of disciplinary action in the commander of the ship when at sea or in a foreign port."[84]

In *Kinsella v. Singleton*, the government made several arguments why trying a dependent wife for a noncapital crime was different from the facts in *Covert* when the Court refused to allow a dependent to be tried in a court-martial for a capital offense. It noted that the concurrences in *Covert* indicated that there could be "a compelling necessity" to allow court-martial jurisdiction over noncapital civilian crimes. The necessities given include the effect the civilians have in the

[80] *Supra* note 75 at 280.
[81] *Id.* at 280.
[82] *Supra* note 74 at 284.
[83] *Ex parte* Reed, *supra* note 26, and Johnson v. Sayre, *supra* note 27.
[84] *Supra* note 74 at 285.

military community, the privilege they have to reside in the community upon their acknowledgement of military control, that they are part of the "military establishment, that the morale needs of the military community requires jurisdiction over the civilians, and that our international agreements with foreign states permit military jurisdiction over our nationals."[85] Justice Clark, writing for five members of the Court, rejected the contention that the capital or noncapital nature of the crime had any impact on military authority over civilians, stating, "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."[86] At the end of the day, the Court embraced and strengthened its decision in *Covert*, declaring "since this Court has said that the Necessary and Proper Clause[87] cannot expand Clause 14[88] so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital crimes."[89]

Recognizing that it essentially left the military powerless to punish the behavior of its accompanying civilians overseas, the Court suggested solutions to the problem its rulings created. One approach was to use the pattern of *Ex parte Reed*, where a civilian employee is appointed and approved by a commander, stays until discharge, and signs an agreement subjecting him to military jurisdiction.[90] Another is to "incorporate those civilian employees who are to be stationed outside the United States directly into the armed services, either by

[85] *Supra* note 76 at 238-239.
[86] *Id.* at 243.
[87] Quoted at *supra* note 67.
[88] Quoted at *supra* note 68.
[89] *Supra* note 76 at 248.
[90] *Id.* at 286.

compulsory induction or by voluntary enlistment."[91] Justice Clark suggested two other options in *Kinsella v. Singleton.* One option was to turn an offending civilian over to the foreign host nation for trial. The Court suggested this might have a greater deterring impact than any other avenue.[92] The other alternative mentioned may turn out to be the solution to the current problem and the object of current legislation. As observed by the Court, "the immediate return to the United States permanently of such civilian dependents, or their subsequent prosecution in the United States for the more serious offenses when authorized by the Congress, might well be the answer to the disciplinary problem. Certainly such trials would not involve as much expense nor be as difficult of successful prosecution as capital offenses."[93]

These cases revealed a less than unanimous Court, for Justices Harlan and Frankfurter expressed the view in their dissent that civilian employees could be court-martialed in peacetime for non-capital crimes,[94] and Justices Whittaker and Stewart believed that civilian employees of the Armed Forces, as opposed to dependents, could be court-martialed in peacetime.[95] In the end, however, the cases firmly established the fact that Art. 2(a)(11) could not pass Constitutional muster in its grant of peacetime military criminal jurisdiction over civilians.

[91] *Id.* at 286.
[92] *Supra* note 76 at 245-246.
[93] *Id.* at 246.
[94] 361 U.S. at 249-259.
[95] *Id.* at 259-277.

**E. Application of Art 2(a)(10) to civilians in peacetime versus a declared war**

The United States military involvement in Vietnam continued the challenges of administering justice in regard to American citizens. At the beginning of United States buildup, a small group of selected officers and senior non-commissioned officers made up the majority of our personnel in Vietnam. All courts-martial for the Army in the country for 1965 was 3.55 per 1000.[96] Prior to 1965, "[s]erious crime in the small U.S. civilian community was virtually nonexistent. There was no drug problem, and black market dealings and currency manipulation were insignificant compared to the levels reached in later years."[97] However, the troop buildup brought an influx of civilian contractors. As the increased troops brought increased crime by active military members, so the explosion in civilians brought an increase in crime by contractor employees.[98] In 1967, as the amount of serious crime committed by civilians in Vietnam increased, a difference of opinion arose between the military command in Vietnam and the State Department. While the military command wanted to use courts-martial to handle black market and currency manipulation crimes, the State Department believed only very serious crimes should go to courts-martial, using administrative sanctions for the majority of offenses. These included loss of employment or military privileges.[99] Four cases went to courts-martial with State Department approval, one of which was the trial of William Averette for conspiracy to commit larceny and attempted larceny of 36,000 government

[96] Prugh, Major General George S., Law at War: Vietnam, 1975, page 98.
[97] *Id.*
[98] *Id.*
[99] *Id.* at 109.

batteries.[100] Upon Averette's conviction, the Court of Military Appeals considered his case to determine whether the language of what is now Article 2(a) 10, UCMJ[101], requires a declared war when it grants jurisdiction over civilians "in time of war".[102] The court determined that the language of the UCMJ requires a Congressional formally declared war to trigger jurisdiction over civilians.[103] The holding did not go so far as to discuss whether Congress could subject civilians to military jurisdiction in time of war, but limited its holding to the narrow issue that "for a civilian to be triable by court-martial in 'time of war,' Article 2(10) means a war formally declared by Congress."[104] The court conceded that the conflict in Vietnam certainly looked like a war, but said, "such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction."[105] As recognized by the court, a "broader construction...would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs."[106] *Averette* had immediate and long-term impact on the military's ability to hold civilians accountable for their crimes in anything but a formally declared war. Less than a month later the United States Army Court of Military Review overturned the court-martial conviction of a civilian employed by Lear-Sigler Incorporated in Vietnam for manslaughter and aggravated assault in the shooting

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[100] *Id.*
[101] Article 2(a)10, UCMJ is quoted in *supra* note 25.
[102] U.S. v. Averette, 41 C.M.R. 363 (1970).
[103] *Id.* at 365.
[104] *Id.*
[105] *Id.*
[106] *Id.*

of three soldiers.[107] The holding was based on *Averette's* strict interpretation of the phrase "in time of war." The court seemed to express its opinion with regret, as it recounted that despite the fact that "[a]s far back as the Indian Wars, court-martial jurisdiction has been exercised over civilians serving with the armies in the field during hostilities which were not formally declared wars"...and despite "the fact that this accused will probably never be retried for the offenses involved in this case," it was "constrained" to find that jurisdiction did not exist because of the precedent of the *Averette* holding.[108] In the long term, these decisions would provide the impetus for the need of legislation to amend the UCMJ to allow for military jurisdiction in situations broader than formally declared wars.

## PART III. CONCEPTS AND PRINCIPLES OF EXTRATERRITORIAL JURISDICTION IN INTERNATIONAL LAW

The problem of criminal activity by civilians associated with the United States military has been identified and discussed, as well as the historical practice of dealing with the offending civilians, and the restraints of the last forty years in prosecuting these individuals based on *Covert* and its progeny. If the UCMJ, Constitutional provisions and the cases discussed thus far were the only factors in addressing this problem, it might be appropriate to proceed directly to a discussion of how new legislation or Constitutional amendments could be crafted to cure the problem of dealing with extraterritorial civilian crime. However, we are not ready for that discussion yet, due to the constraints of the norms and

[107] U.S. v. Grossman, 42 C.M.R. 529 (1970).
[108] *Id.* at 530.

principles of international laws, customs and practices. If the United States acted to cure this problem with new legislation devoid of consideration of international principles of law and comity, it may satisfy Constitutional requirements but alienate the rest of the community of nations. The result would be a situation as unworkable as what now exists, for any attempt of the United States to exercise extraterritorial jurisdiction in another state's territory empty of international concern would doom the attempts to cure the problem before the ink dried on the legislation. Therefore, United States practice should be consistent with customary international law so that in addressing criminal conduct of its own citizens, relationships with host nations are not scuttled. Perhaps a definition of customary international law would be helpful here to understand what the standards are that we are trying to comply with. Although customary international law is not always an exact standard due to its living and breathing nature as it forms, matures, and becomes binding on states, a simple and concise definition is "a general practice accepted as law."[109] With these considerations in mind, we proceed to a discussion of applicable international law.

## A. Customary international law

### 1. Territorial sovereignty versus military sovereignty over its forces

The foundational principle of statehood is the concept that every nation is sovereign over its own territory, and this sovereignty means that a state may

[109] J. Brierly, The Law of Nations 60 (6th ed. 1963).

exercise criminal jurisdiction over all persons within its sovereign territory.[110] This is true for its citizens, visitors, and foreign military forces alike. Stated more concisely, "In public international law, territorial jurisdiction is one of the basic attributes of sovereignty."[111] The Permanent Court of International Justice (PCIJ) discussed this principle of territorial sovereignty almost three quarters of a century ago in the Case of *The S.S. Lotus*.[112] In the *S.S. Lotus*, the French steam ship Lotus collided with a Turkish collier in international waters around midnight on August 2, 1926, resulting in the loss of eight Turkish sailors and the loss of the Turkish collier Boz-Kourt. Upon the arrival of the French steamer in the port at Constantinople, the Turks arrested the French officer from the Lotus who was the officer of the watch at the time of the collision and tried him and the Turkish captain of the Boz-Kourt for manslaughter.[113] The French instituted an action against Turkey in the PCIJ, asking the Court to declare that Turkey acted contrary to the principles of international law in asserting jurisdiction over the French officer.[114] The French position was that only the flag state of a vessel has jurisdiction over a ship on the high seas. Turkey took the position that "[v]essels on the high seas form part of the territory of the nation whose flag they fly," and since the offense took place on the Turkish vessel, they had jurisdiction over the offense and offenders just as they would have had if the action occurred on its

[110] "Sovereignty" is defined in §206, Comment b., Restatement of the Law, Third, Foreign Relations Law of the United States (1987) "'Sovereignty' is a term used in many senses and is much abused. As used here, it implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."
[111] Serge Lazareff, Status of Military Forces Under Current International Law 7 (1971).
[112] The Case of the S.S. Lotus, P.C.I.J., Ser. A, No. 10 (1927).
[113] *Id.* at 10-11.
[114] *Id.* at 6.

land.[115] The Court essentially adopted Turkey's position. In making its determination whether Turkey's territorial jurisdiction extended to acts done to its flagged ship on the high seas, the Court turned to the principles of customary international law. While both states were signatories of the Convention of Lausanne of July 24th, 1923, the Convention did not specifically answer the question at hand. However, it did say that jurisdictional questions would be determined in accordance with the "principles of international law."[116] In defining "principles of international law", the Court said that "as ordinarily used, [this] can only mean international law as it is applied between all nations belonging to the community of States."[117] Using the principles of customary international law, the *Lotus* Court addressed the scope and extent of a state's territorial jurisdiction, saying, "Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."[118] But the *Lotus* Court went on to say that international law does not prohibit States from extending "the jurisdiction of their courts to persons, property and acts outside their territory, [but] it leaves them in this respect a wide measure of discretion which is only limited in certain

[115] *Id.* at 9.
[116] *Id.* at 16.
[117] *Id.*
[118] *Id.* at 18-19.

cases by prohibitive rules."[119] A State "should not overstep the limits which international law places upon its jurisdiction; [but] within these limits, its title to exercise jurisdiction rests in its sovereignty."[120] In *Lotus*, France labored to show that Turkey overstepped its bounds of international law in asserting jurisdiction over the French officer, but the Court required either a treaty provision between the two States, or a showing that there was a "custom having the force of law" regulating the matter.[121] In this instance, neither existed, and the PCIJ found that an act that occurred on or to a State's flagged vessel is the same as affecting that act in its territory within its borders and shores. Here, Turkey violated no rule of international law in extending its jurisdiction over acts done to its citizens and ship on the high seas.

International law, then, clearly establishes the right of a sovereign state to exercise jurisdiction within its territory as discussed above.[122] But customary international law has not historically addressed issues arising from friendly foreign military forces in regard to the assertion of jurisdiction over criminal offenses. In the current state of affairs, it is recognized that the sending state has an equally vital interest in retaining jurisdiction over its forces and accompanying personnel, but until recent times, all that was contemplated is what Lazareff called

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[119] Id. at 19.
[120] Id.
[121] Id. at 21.
[122] Additional discussion of territorial sovereignty of States is found in Section 206 of the Restatement, Third: § 206 CAPACITIES, RIGHTS, AND DUTIES OF STATES
Under international law, a state has:
(a) sovereignty over its territory and general authority over its nationals;
(b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies;
(c) capacity to join with other states to make international law, as customary law or by international agreement.

the classical situation of host state sovereignty –jurisdiction that is "exclusive and complete."[123] Prior to 1914, military forces occupying a country were not generally present as a friendly force that was peacefully coexisting with the host nation; rather the forces were present as occupying forces.[124] When a foreign state is occupying another during wartime or hostilities, the occupied state remains sovereign and its territorial sovereignty remains intact, but the occupying forces may impose many requirements on the state at the same time, and will certainly not subject its forces to the criminal jurisdiction of the occupied nation. However, foreign military presence in peacetime leaves the host nation with all aspects of its territorial sovereignty, and if it consents to the presence of foreign forces, an agreement, whether termed a SOFA, treaty or accord or otherwise, will define the jurisdictional reach over the forces and accompanying individuals.[125] Today, many more nations send their forces to foreign states for purposes other than war and occupation. These purposes may include peacekeeping, shared training and exercises, the use of the host nation as a staging site to enable the sending state to have a military and political presence in a particular region, the ability to respond to crises in the region faster, and for the purpose of nation building and strengthening the host allied state. This is not a forced occupation or coexistence, but occurs with the express consent of the host. Obviously, the host nation derives a benefit from the arrangement too – financial assistance, security from enemies within and without the state, influence with the government of the sending state, shared technology and training, and stability within the state.

[123] *Supra* note 111 at 7.
[124] *Id.*
[125] *See generally supra* note 111 at 8.

Mutual benefit then is what brings the states to the table to negotiate the extent of jurisdiction in an agreement. However, when no agreement exists regarding the rights of the states when one hosts the other's forces, since customary international law has not dealt with jurisdiction other than to say that each state has exclusive territorial jurisdiction in its borders, other theories arose to define jurisdictional reach in these situations. Otherwise, "except for the disciplinary power inherent in the military system, a force must be considered as subject to the laws of the receiving State."[126] Lazareff discusses the two theories –"the 'law of the flag', that gives extensive jurisdictional powers to the force; [and] the second [that] shares the jurisdictional power between the receiving and sending State."[127]

**2. Law of the flag theory and divided jurisdiction**

As mentioned above, Lazareff discusses the two competing theories of jurisdiction between allies in the absence of a treaty that addresses the matter. He maintains that many American theorists favor the concept known as the "Law of the Flag", while many British scholars support a principle of territorial sovereignty in which the sending and receiving states share jurisdiction.[128] Advocates of the law of the flag theory find some of their authority in Chief Justice Marshall's opinion of in *The Schooner Exchange v. M'Faddon*.[129] The case involved a private ship, owned by American citizens, which was seized by France while on a voyage to Spain. When the ship came into port at Philadelphia

[126] *Id* at 9.
[127] *Id.*
[128] *Id.* at 11.
[129] 11 U.S. (7 Cranch) 116 (1812).

under the flag of Napoleon of France, it was seized in the libel action of the American owners. Ultimately, the court decided against the original owners and in favor of the French government, on the theory that sovereigns are exempt from the jurisdiction of another sovereign in what has become known as the law of the flag theory. While the opinion rested on the assertion that the French armed warship entered the U.S. port under an implied promise that it was immune to foreign jurisdiction under the normal customs that ships of war are generally allowed free entry into port without losing the flag state's territorial immunity[130], the dictum in the opinion went further. Chief Justice Marshall, speaking of a "case in which a sovereign is understood to cede that portion of territorial jurisdiction...where he allows the troops of a foreign prince to pass through his dominions,"[131] said, "The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."[132] Lazareff comments on the importance of the opinion and that it is often quoted and the subject of frequent commentaries, and he also acknowledges that "[f]or most American writers, Chief justice Marshall stated the principle of complete immunity of jurisdiction of friendly forces on foreign soil."[133] However, he goes on to state that many believe the opinion and Marshall's dicta went too far, in that the question "was not to find out which court had jurisdiction over *members of* a force, but to determine whether *a Force*, as

[130] *Id.* at 147.
[131] *Id.* at 139.
[132] *Id.* at 140.
[133] *Supra* note 11 at 15.

such, could be brought before an American court. The purpose of the libel was to prove that the vessel did not belong to France; it was not to determine the status of members of the French Navy in the United States."[134] Yet, the discussion of the status of foreign troops in a friendly receiving state was included in the case despite its apparent unrelated nature to the question that was at issue, and it now stands as a statement of the law of the flag theory of territorial jurisdiction. United States foreign policy essentially followed the law of the flag theory for 150 years, and many other nations followed the same course.[135] The theory of the doctrine made sense – military commanders needed the ability to discipline their troops lest they lose control of military discipline.[136] "This notion became so firmly rooted in Western military thought that custom ultimately evolved into formal agreements that gave sending states exclusive jurisdiction over the members of their forces. In World Wars I and II, the United States and United Kingdom both negotiated such agreements.[137]

An alternative to the law of the flag theory is that of "restricted territorial sovereignty."[138] In describing the common sense value of the practice, which is a shared jurisdiction scheme, Lazareff points out that neither the alternative extreme of a receiving state asserting full territorial sovereignty over a visiting force nor the opposite extreme of allowing a visiting force to have complete jurisdictional independence on foreign soil would be viable. It is generally well recognized, therefore, that the military member of a visiting force in a way represents his

[134] *Id.*
[135] Steven J. Lepper, A Primer on Foreign Criminal Jurisdiction, 37 A.F. L. REV. 169, 171 (1994).
[136] *Id.*
[137] *Id.*
[138] *Id.* at 17.

nation, and that while he is performing within the scope of his duties, the sending state will retain jurisdiction.[139] This is also the arrangement of the NATO SOFA, which will be discussed later. The birth of the NATO SOFA was the result of a change in attitudes of states after World War II. Sovereign states no longer were willing to concede their jurisdiction over foreign forces on a wholesale basis, and nations like the United States recognized that arrangements like the SOFA, whereby they still retained some degree of jurisdiction over their forces deployed overseas even if it was concurrent jurisdiction, was better than the inevitable alternative of losing all jurisdiction to the rightful claim of a foreign state's exclusive jurisdiction.[140] While remnants of the law of the flag theory remained, it was for the most part relegated to the annals of history.

### 3. Consent of receiving state

Regardless of the view a nation wishes to espouse, be it law of the flag or divided jurisdiction, with the obvious exception of a forced military occupation, no foreign state can station its military forces on the sovereign soil of another nation without its consent, nor can the sending state assert and maintain jurisdiction over its own nationals, whether military or civilian, without the consent in one form or another of the receiving state. Chief Justice Marshall reiterated this point in *The Schooner Exchange*. "The jurisdiction of a nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from

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[139] *Id.*
[140] *Supra* note 135 at 171.

an external source, would imply a dimination [sic] of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."[141] The manner in which such consent may be varied, and as Marshall stated, may be implied or express,[142] but assertion of sovereignty by the sending state void of consent is untenable. Thus, many states resort to SOFAs, as the United States has in many cases, and as many nations including the United States have done with the NATO SOFA. Respect for the sovereignty of individual states, and thus, the need to obtain consent from a state when exercising any kind of jurisdiction in that state is also reflected in *The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, which sets out seven basic principles of international respect among friendly nations:

> (1) states shall refrain from the threat or use of force against the territorial integrity or political independence of any state;
>
> (2) states shall settle their international disputes by peaceful means;
>
> (3) states shall not intervene in matters within the domestic jurisdiction of any state;
>
> (4) states have a duty to cooperate with one another in accordance with the Charter;
>
> (5) equal rights and self-determination of peoples;
>
> (6) sovereign equality of states;

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[141] *Supra* note 129 at 136.
[142] *Id.*

(7) states shall fulfill in good faith their obligations under the United Nations Charter.[143]

International law, whether based on custom or treaty, generally allows for a state to exercise some degree of criminal jurisdiction over its own forces even when located on friendly foreign soil, but it is also clear that some degree of receiving state consent is needed. If this is true for military forces, how much more then, must a state obtain some sort of consent from the foreign state when seeking to exercise jurisdiction not over its forces alone, but also over the focus of this paper – civilians accompanying those forces. Even if there were some kind of written SOFA, treaty or agreement regarding civilians, jurisdictional arguments will always be more difficult to make for the sending state when its not their uniformed forces that are at issue, but civilians. Despite attempts of the sending state to try to define these un-uniformed individuals as part of the "force", the host state will be less willing to automatically cede jurisdiction to the sending state. It is therefore useful to look at the traditional grounds for asserting jurisdiction over individuals, for they may aid in the justification for the sending state to assert jurisdiction in some cases. But it should also be kept in mind that the same five traditional grounds of jurisdiction described below could provide the argument for legitimate jurisdiction of the host nation over the actions of the civilian who accompanies United States forces abroad.

[143] The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, approved by consensus (including the United States), 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. No. 28 at 121, 65 Am.J.Int'l L. 243

## B. Traditional grounds justifying extraterritorial application of criminal Jurisdiction

In describing the authority of a state to exercise jurisdiction, it is helpful to discuss two concepts – the authority of a state to apply its criminal laws to individuals and their activities, and the authority and ability of a state to enforce those criminal laws in regard to the individual. The first concept is known as the right to prescribe or prescriptive jurisdiction, and the second is called the right to enforce.[144] In the case of military forces stationed overseas, both are necessary in regard to civilians accompanying the forces and both the sending and receiving states must recognize the ability of the sending state to exercise prescriptive and enforcement jurisdiction for the sending state to be successful in exercising criminal jurisdiction over the civilians.[145] In exercising this jurisdiction over extraterritorial criminal conduct, international law recognizes five traditional bases of jurisdiction: territorial principle, national principle, protective principle, universal principle, and passive personality principle. These principles were first

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[144] RESTATEMENT OF THE LAW, THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES, (1987), American Law Institute RULES AND PRINCIPLES, Part IV - Jurisdiction and Judgments, Introductory Note

[145] The Restatement Third, Part IV, Introductory Note goes on to break down the types of jurisdiction even further: "...[t]his Restatement deals with jurisdiction under the following headings: (a) jurisdiction to prescribe, i.e., the authority of a state to make its law applicable to persons or activities; (b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and (c) jurisdiction to enforce, i.e., the authority of a state to use the resources of government to induce or compel compliance with its law." Part IV, § 401, defines these types of jurisdiction is even greater detail:
"(a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court; (b) jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings; (c) jurisdiction to enforce, *i.e.*, to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."

developed by the Harvard Research Project in 1935.[146] Territorial jurisdiction is based on a nation's sovereignty over the place where the crime occurs; national jurisdiction is based on the fact that the offender is a citizen of the prosecuting nation; the protective principle derives from the inherent right of a nation to prevent potential harm to its national interest; universal jurisdiction is justified on the basis that certain crimes, such as terrorism and hijacking, are especially heinous and harmful to humanity; and the passive personality principle of applying extraterritorial jurisdiction is based on the fact that the victim of the crime is a citizen or national of the prosecuting state. One of the more far reaching cases in recent history to embrace these five principles of jurisdiction is *United States of America v. Yunis*.[147] This case involved international terrorism and aircraft hijacking. The United States indicted and tried Yunis for his role in hijacking a Jordanian civilian aircraft with American citizens aboard. The aircraft departed from Lebanon, flew around the Mideast, and returned to Beirut where it was blown up by Yunis and the Americans kidnapped. The flight never entered United States airspace, but the United States nonetheless indicted and tried Yunis. The defendant argued that the United States had no jurisdiction over him or the crime. However, the parties and the court agreed that there the five traditional bases of extraterritorial criminal jurisdiction as stated above exist under international law.[148] The District Court stated that "[m]ost courts, including our Court of Appeals, have adopted the Harvard Research designations on

[146] Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 AJIL Supp. 435, 445 (1935).
[147] 681 F. Supp. 896 (1988).
[148] *Id.* at 899.

jurisdiction."[149] The Court ultimately went on to find the existence of United States jurisdiction over Yunis and his crimes based on the universal and passive personality principles, which may be the most controversial and less definite of the five principles.[150] Thus, in attempting to assert United States' jurisdiction over DoD associated civilians abroad, part of the rationale that should be used to test the legitimacy of our assertion should be at least one of these five principles. While all five could potentially be used to justify jurisdiction, the territorial principle is unlikely to be a valid claim in a foreign state, the protective principle is most likely already established by the terms of a treaty of SOFA with the host nation,[151] and the universal principle is of possible use but most likely would be rare assertion on the likely facts. Thus, when contemplating crimes of DoD associated civilians against other Americans or United States property, the national and passive personality principles are most likely the justification that would be used to justify United States criminal jurisdiction over Americans abroad.

### C. United States Practice

During the period of the First World War, nations were fairly uniform in their acceptance of the law of the flag theory, and the United States fell squarely within that accepted norm. This acceptance was consistent with the idea "that the jurisdictional power cannot be separated from the exercise of disciplinary power

[149] *Id.* at 900. The Court also noted that "[s]everal reputable treatises have also recognized the principles: L. Henkin, International Law Cases and Materials 447 (1980); A. D'Amato, International Law and World Order 564 (1980)."

[151] For instance, in espionage cases or cases where the security of the guest nation are at issue as a result of the guest nation's nationals, most SOFAs give jurisdiction to the guest nation.

which is an essential part of military organization."[152] Great Britain was one of the exceptions to the general acceptance of the law of the flag theory, choosing instead to frequently base jurisdiction on territorial sovereignty, and many of the agreements it negotiated reflected that practice.[153] Great Britain acceded to the United States' position that its forces were immune from the criminal jurisdiction of the host nation when it negotiated an agreement with America in 1942 as American forces arrived on its soil, but the future was in view as the British Government reserved the right not to apply the terms of the agreement granting jurisdiction to the United States, and instead trying an American member in its own courts.[154] However, reflecting the United States' position that its forces were immune from host nation criminal jurisdiction, "[i]n the United Kingdom, only the American Forces were enjoying a complete immunity of jurisdiction."[155] The tide began to turn from complete immunity from host nation jurisdiction by visiting forces after the Second World War as reflected in the NATO SOFA discussed below. Concurrent jurisdiction became the norm as reflected in the SOFA, and United States policy shifted to accommodate this change. Even prior to the SOFA, an agreement between France and The United States, signed in November of 1950, embraced the concept of territorial sovereignty.[156] Further change in American policy was reflected in 1952 when the State Department, in what became known as the Tate Letter, officially stated that it would follow the restrictive theory of sovereign immunity, and that only public acts, rather than

[152] *Supra* note 111 at 19.
[153] *Id.* at 22.
[154] *Id.* at 24.
[155] *Id.* at 25.
[156] *Id.* at 34.

private acts, would be covered by sovereign immunity.[157] Slowly, the United States was beginning to bend to international pressure that the idea that the law of the flag theory was not necessarily absolute, and accommodations would need to be made to sovereign host nations in some instances. The United States still had the over-arching desire to maintain jurisdiction over its forces at all times, and as detailed below, placed that policy in writing, but the post –World War II period would see a shift toward multi-lateral and bilateral agreements which crated a structure of concurrent jurisdiction, or shared jurisdiction, and a strengthening of the principle of territorial sovereignty for host nations. The prime example of this newly shared jurisdiction scheme was the North Atlantic Treaty Organization Status of Forces Agreement, referred previously to as the NATO SOFA. The evolution of SOFAs, combined with the Supreme Court's decisions in *Reid* and its progeny, would eventually bring the United States military face to face with the issue of unchecked extraterritorial civilian crime in the military.

### D. Status of Forces Agreements (NATO SOFA)

The post-World War II period brought on the new development and practice of large United States military forces permanently stationed at United States military installations in foreign states to fight the new Cold War and protect its allies from the threat of Communist aggression. The United States emerged from the war as a superpower and was seen as the protector of the world by many, thus justifying its friendly presence on foreign soil. This required the creation of new multilateral and bilateral agreements between states to address a host of issues

[157] 26 DEP'T ST. BULL. 984-985 (1952).

when the forces of one state are stationed in another host state, including defining "the rights, immunities, and duties of the force, its members, and family members."[158] SOFAs address a multitude of issues from taxation to living space, civil jurisdiction to driver's licenses, but one of the main issues addressed is criminal jurisdiction over the visiting force and family members. It is not practical to have SOFAs in place everywhere around the globe where our forces may be, due to the fact that some states like Somalia and Rwanda do not have the governmental infrastructure to enter into a meaningful SOFA or honor its provisions. Furthermore, it is not practical to enter into a SOFA wherever forces land since our military presence is sometimes not welcomed and other times is for a very brief period. However, United States practice is to negotiate a SOFA where possible to protect the rights and immunities of our forces.[159] When agreements are in place, most are still not adequate to address the problems of prosecuting foreign civilians associated with the military when the civilians commit offenses wholly against the sending state or nationals of the sending state. In fact, while many agreements deal with criminal jurisdiction over foreign military members and civilians, United States law since the *Reid* line of cases has prevented meaningful action by the United States to capitalize upon its jurisdiction that a SOFA may confer on it. The NATO SOFA is representative of the structure of many of these agreements. Article VII of the NATO SOFA

[158] Colonel Richard J. Erickson, Status of Forces Agreements: A Sharing of Sovereign Prerogative, 37 A.F.L. REV. 137, 140 (1994).

[159] According to the INTERNATIONAL & OPERATIONAL LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE, INTERNATIONAL NEGOTIATION & AGREEMENT HANDBOOK, tab 18 (2000), the United States currently has 105 SOFAs covering 101 countries.

provides for sending state jurisdiction, receiving state jurisdiction, and concurrent jurisdiction depending on the scenario. The first four paragraphs of Article VII read as follows:

> 1. Subject to the provisions of this Article,
>
> (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.
>
> 2. (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
>
> (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.
>
> (c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include
>
> (i) treason against the State;
>
> (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.
>
> 3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:
>
> (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
>
> (i) offenses solely against the property or security of that State, or offenses solely against the person or property

> of another member of the force or civilian component of that State or of a dependent;
>
> (ii) offenses arising out of any act or omission in the performance of official duty.
>
> (b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.
>
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
>
> 4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.[160]

Thus, under paragraph 2 (a), if the United States is the sending state, it has exclusive criminal jurisdiction over its persons subject to military law (*military members only now since the Reid line of cases)* if United States law is violated but the receiving state law is not violated. Likewise, paragraph 2 (b) gives exclusive jurisdiction over military members, the civilian component *and dependents* to the receiving state if only its laws are breached. If both states can claim their laws have been violated, resulting in concurrent jurisdiction, paragraph 3 gives the sending state primary jurisdiction over military members or civilian component members based on the status of the victim – crimes against other United states citizens or United States property, or, if the offense arises out of the person's official duties. Otherwise, the receiving state has primary jurisdiction. Paragraph

[160] Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

3 allows for either state to request a waiver and either to grant a waiver to the SOFA's jurisdictional arrangement. The United States takes full advantage of this last provision, as its official policy it to maximize United States jurisdiction in cases where a foreign state seeks to prosecute a United States military member. This has been the position of the United States ever since the Senate ratified the NATO SOFA[161], and is implemented by the Department of Defense in its directives.[162] DoD Directive 5525.1 states, "It is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons." It appears then that there is room in our international agreements for the United States to assert jurisdiction, or at least ask for sympathetic consideration of a request for waiver of host state jurisdiction so that the United States could try its civilians in its own courts. This could prevent some of the injustices discussed earlier such as a host state exercising its criminal justice system against a United states citizen in a manner that does not comport with our ideas of due process, or possibly worse where a person guilty of a heinous crime goes unpunished because the host state does not desire to exercise

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[161] Senate Res., Ratification with Reservations, NATO SOFA, *supra* note 160, at 1828. The resolution reads in part, "If, in the opinion of such Commanding Officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights the accused would enjoy in the United States, the Commanding Officer shall request the authorities of the receiving State to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving State to give "sympathetic consideration" to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives."

[162] DoD Directive 5525.1, Status of Forces Policies Information, August 7, 1979, GC, DoD.

jurisdiction and the United States cannot prosecute the civilian for extraterritorial crime. In this situation, without laws allowing the United States to prosecute the DoD accompanying civilians, maximizing United States jurisdiction would only serve to undermine the effective administration of criminal justice. The need for the Extraterritorial Jurisdiction Act of 2000 is thus apparent.

## PART IV. SOLUTION TO THE PROBLEM

### A. The Impetus of *U.S. v. Gatlin*

Even as the Senate was considering the merits of SB 768, a case was working its way through the judicial system that would powerfully illustrate the need for legislative intervention to correct the gap created by *Reid* and its progeny. *United States v. Gatlin*[163] involved the prosecution of an American civilian who was charged with sexually molesting his stepdaughter while living with his active duty Army wife in Germany. Gatlin's only association with the United States military was as a dependent husband. The family lived in housing that the Army leased from the government of Germany, and that is where the charged conduct occurred.[164] Gatlin had sexual intercourse with his stepdaughter from August 1996 through at least January 1997. She was 13 years of age at the time. When the family returned to the United States in September 1997, the stepdaughter gave birth to Gatlin's child.[165] Gatlin was charged in United States District Court with

[163] 216 F.3d 207 (2d Cir.2000).
[164] *Id.* at 209.
[165] *Id.* at 210.

sexual abuse of a child, pled guilty, and moved to dismiss the charge for lack of jurisdiction prior to acceptance of the plea.[166]

The District Court found jurisdiction based on the facts that the conduct occurred within the "special maritime and territorial jurisdiction of the United States," as set forth in Section 7, Title 18 U.S.C. §2243(a).[167] The Court of Appeals reversed, holding that §7(3) does not apply extraterritorially, and therefore the military housing in Germany was not within the special maritime and territorial jurisdiction of the United States.[168] The result was dismissal of the indictment and Gatlin was not held accountable for his crime.

In his opinion, Judge Jose Cabranes noted that Congress has the authority to "regulate the conduct of its citizens and nationals outside the territorial boundaries of the United States."[169] Thus, the court found jurisdiction in this case rested not on a question of "congressional power" but on "congressional intent."[170] He stated that when "determining whether a statute applies extraterritorially, we are guided by a general 'presumption that Acts of Congress do not ordinarily apply outside our borders'."[171] After reviewing the legislative history of the statute, the court did not find evidence that Congress intended the act to apply outside the borders on the United States,[172] and that "absent 'clear evidence of congressional intent' to apply a statute beyond our borders, the statute will apply only to the

[166] *Id.*
[167] *Id.*
[168] *Id.* at 220.
[169] *Id.* at 211, *citing* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). ("Aramco")
[170] *Id.*
[171] *Id., citing* Sale v. Haitian Ctrs. Council, Inc., *509*
[172] *Id* at 219.

territorial United States."[173] Congress could have extended its criminal jurisdiction overseas to include the military installation in Germany, and to include conduct by American citizens, but it failed to do so explicitly, and therefore Gatlin was not subject to criminal prosecution by the United States.

Judge Cabranes laid the responsibility for this jurisdictional gap squarely on the shoulders of Congress. He quipped that the court's decision finding no authority to assert criminal jurisdiction over Gatlin "should come as little surprise to anyone familiar with the history of criminal prosecution of civilians accompanying the military overseas...[because even before the *Reid* decision] ...that civilians may not be tried in courts martial during times of peace, courts uniformly had recognized that civilians accompanying the military overseas who committed crimes were prosecutable, if at all, *only* in courts martial."[174] He continued, saying that despite the clear fact that the *Reid v. Covert* decision created a jurisdictional gap, Congress never seriously attempted to remedy the situation and provide for jurisdiction in cases such as these.[175] Cabranes even labored to recite the numerous "commentators",[176] "executive branch

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[173] *Id.* at 211. *See also* Aramco, *supra* note 169 at 248.
[174] *Id.* at 220.
[175] *Id.*
[176] *Id.* at 221, note 17, "*Extraterritorial Criminal Jurisdiction: Hearing on H.R. 763, H.R. 6148, and H.R. 7842 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong. 42-62 (1977) ("*Extraterritorial Criminal Jurisdiction Hearing*") (statement of Benjamin Forman, Assistant General Counsel, Department of Defense); Letter from L. Niederlehner, Acting General Counsel of the Department of Defense, to Sen. James O. Eastland, Chairman of the Senate Judiciary Committee (July 24, 1970), *reprinted in Operation of Article VII, NATO Status of Forces Treaty: Hearing Before a Subcomm. of the Senate Comm. on Armed Services*, 91st Cong. 4-10 (1970); *Operation of Article VII, NATO Status of Forces Treaty: Hearing Before a Subcomm. of the Senate Comm. on Armed Services*, 89th Cong. 2 (1966) (statement of Ray W. Bronez, Director, Foreign Military Rights Affairs, Department of Defense); DEPARTMENT OF ARMY, PAMPHLET 27-21, ADMINISTRATIVE & CIVIL LAW HANDBOOK para. 2-19c, at 59 (Mar. 15, 1992)."

officials,"[177] "government commissions,"[178] and other writers[179] who had studied and discussed the problem of the jurisdictional gap and suggested solutions over the years since *Reid v. Covert* was decided, all with apparent insufficient force to cause Congress to remedy the situation. To further point out the awareness of Congress of the gap's existence, Cabranes listed the congressional bills on the

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[177] *Id.*, note 18, "*Military Extraterritorial Jurisdiction Act of 1999; Hearing on H.R. 3380 Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 106th Cong. (2000) (Statement of Roger Pauley, Director of Policy and Legislation, Criminal Division, Department of Justice), *available in* 2000 WL 11070426 (CONGTMY Database, Mar. 30, 2000); *Extraterritorial Criminal Jurisdiction Hearing, supra*, at 30-33 (statement of Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division, Department of Justice); *id.* at 62-65 (statement of James H. Michel, Assistant Legal Adviser, Department of State); *see also, e.g.*, Letter from David C. Gompert, Deputy Director, Politico-Military Affairs Bureau, Department of State, to J.K. Fasick, Director, International Division, General Accounting Office (June 8, 1979), *reprinted in* COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS: SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DOD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED, 96th Cong. 43-47 (Sept. 11, 1979) ("GAO REPORT"); Letter from Kevin D. Rooney, Assistant Attorney General for Administration, Department of Justice, to Allen R. Voss, Director, General Government Division, General Accounting Office (July 5, 1979) ("DOJ Letter"), *reprinted in* GAO REPORT, *supra*, at 48-51."

[178] Id., note 19, "REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT *passim* (1997 Report to the Secretary of Defense, the Attorney General and the Congress of the United States Pursuant to Pub. L. No. 104-106, § 1151) ("ADVISORY COMMITTEE REPORT"); GAO REPORT, *supra*, *passim*."

[179] *Id.*, note 20, "Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT'L & COMP. L. REV. 277, *passim* (1995); Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273, 276-80, 295-96 (1967); Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment--Ex-Servicemen, Civilian Employees and Dependents*, 13 U.S.A.F. JAG L. REV. 184, *passim* (1971); Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces--A Preliminary Analysis*, 13 STAN. L. REV. 461, 507-08 & n.217 (1961); Gregory A. McClelland, *The Problem of Jurisdiction over Civilians Accompanying the Forces Overseas--Still with Us*, 117 MIL. L. REV. 153, *passim* (1987); Jordan J. Paust, *Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of* Erdos, 24 YALE J. INT'L L. 305, *passim* (1999); Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1, 22-23 (1995); Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, *passim* (1992); Stephen B. Swigert, Note, *Extraterritorial Jurisdiction--Criminal Law*, 13 HARV. INT'L L.J. 346, 353-55 (1972); Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712, 715-18 (1958); *see also, e.g.*, DONALD N. ZILLMAN ET AL., THE MILITARY IN AMERICAN SOCIETY 3-17 to -18 (1978) (discussing the "jurisdictional gap"); Robinson O. Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366, 392, 396-97 (same); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, *passim* (1995) (same); Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 179-81 (1994) (same)."

matter that fell by the wayside over the years.[180] Finally, in a rare step for a court to take, Judge Cabranes took "the unusual step of directing the Clerk of Court to forward a copy of [the] opinion to the Chairmen of the Senate and House Armed Services and judiciary Committees."[181] The timing was impeccable; Congress was in the process of considering Senate Bill 768 and House Bill 3380 on the same subject.

**B. The Final Legislation**

The Senate passed Senate Bill 768 on 25 October 2000 and the President signed the bill into law on 22 November 2000.[182] Known as The Military Extraterritorial Jurisdiction Act of 2000 (hereinafter referred to as "the Act"), the new legislation was the first successful effort to correct the problems created by the *Reid v. Covert* court more than forty years earlier. The Act differed in one important aspect from the original proposed Senate Bill 768 in that the Act eliminated the provision to amend Article 2 (a) of the Uniform Code of Military Justice by extending court-martial jurisdiction over civilians accompanying the forces overseas.[183] However, the Act is a significant step in filling the gap in jurisdiction over civilians associated with the military outside the borders of the

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[180] *Id.* at 222, note 23, "S. 768 & S. 899, 106th Cong. (1999); H.R. 3380, 106th Cong. (1999); S. 2484, 105th Cong. (1998); H.R. 4651, 105th Cong. (1998); S. 3 & S. 172, 105th Cong. (1997); S. 2083, 104th Cong. (1996); S. 3, S. 74 & S. 816, 104th Cong. (1995); H.R. 808, 104th Cong. (1995); H.R. 4531, 103d Cong. (1994); S. 129, 103d Cong. (1993); H.R. 5808, 102d Cong. (1992); S. 182, 102d Cong. (1991); S. 147, 101st Cong. (1989); H.R. 255, 99th Cong. (1985); S. 1437, 95th Cong. (1978); H.R. 763, 95th Cong. (1977); S. 1, 94th Cong. (1975); H.R. 3907, 94th Cong. (1975); S. 1745, 92nd Cong. (1971); H.R. 18548 & H.R. 18857, 91st Cong. (1970); S. 2007, 90th Cong. (1967); H.R. 226, 90th Cong. (1967); S. 762, 89th Cong. (1965). *See generally* ADVISORY COMMITTEE REPORT, *supra*, at 9-11; GAO REPORT, *supra*, at 16-18."

[181] *Id.* at 223.

[182] The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat.2488.

[183] *See supra* note 10.

United States. By eliminating the provision for courts-martial of civilians, Congress eliminated several potentially thorny criticisms of the Act. At perhaps the most basic level, one potential issue eliminated was an uncertain public relations reaction. Had Congress allowed civilians to once again be court-martialed by military tribunals, the public may not have been ready to accept the idea of military courts-martial for civilians. Furthermore, since the United States has not fought an actual declared war since World War II, the proposed legislation would have added a Secretarial designated contingency operation to the triggering of court-martial jurisdiction over civilians, and such a measure surely would have brought legal challenges. The elimination of the court-martial option is not, however, entirely positive. In contemplating the validity of extending extraterritorial criminal jurisdiction over civilians, the Overseas Jurisdiction Advisory Committee cited three reasons courts-martial jurisdiction should be extended over civilians who accompany the armed forces overseas. The overseas commander is charged with the responsibility to ensure good order and discipline is maintained and that the mission is accomplished, rather than a detached federal prosecutor away from the deployed forces. As such, he is in a much better position to know the needs of the mission, his troops, and his civilians. Therefore, the Committee believed that "the commander should have the power to initiate steps to hold offenders accountable, and not have to defer to a U.S. attorney located well away from the operation."[184] Second, the Committee pointed out that

[184] REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT (THE OVERSEAS JURISDICTION ADVISORY COMMITTEE), at 39 (18 April 1997).

several serious crimes under the UCMJ that occur in the deployed military situation do not have a parallel criminal statute under federal law, and hence would not be prosecuted.[185] Third, the Committee recognized that a federal trial may be impractical at times while a court-martial convened on-site overseas would not be due to problems of obtaining evidence, victims and witnesses from an overseas location.[186] While these are valid and practical reasons to institute court-martial authority over civilians, the Act's deletion of this provision is not fatal to closing the jurisdictional gap. Certainly, logistical challenges will be present in attempting to secure evidence and witnesses from the deployed site to a federal court, and at times the efforts will not be successful, but while this will always present challenges, it is workable. Concerning the local commander's knowledge of his mission, dangers, and personnel, his input is still available if he testifies at trial. Regarding the inability to charge certain unique military offenses in federal court, even the Committee acknowledges that "the actual void is less than many commanders perceive" and that "[m]any federal criminal statutes are expressly extraterritorial."[187] The most serious crimes can now be charged under the Act.

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[185] *Id.* For example, in note 137 the Committee cites the crimes of misbehavior before an enemy, improper use of a countersign, and forcing a safeguard.

[186] *Id.*

[187] *Id.* at 40, citing the following expressly extraterritorial criminal statutes: 18 U.S.C. § 32 (Destruction of Aircraft), 18 U.S.C. § 112 (Violence against internationally protected person), 18 U.S.C. § 175 (Prohibition against biological weapons), 18 U.S.C. § 351 (Congressional, cabinet, and Supreme Court Assassination), 18 U.S.C. § 793 (Espionage), 18 U.S.C. § 878 (Threats, etc., against internationally protected persons), 18 U.S.C. § 1116 (Murder or manslaughter of foreign officials, official guests, or internationally protected persons), 18 U.S.C. § 1119 (Murder of U.S. national by other U.S. national), 18 U.S.C. § 1203 (Hostage taking), 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant), 18 U.S.C. § 1751 (Presidential and Presidential staff assassination) 18 U.S.C. § 1001(False and Fraudulent Statements), 18 U.S.C. § 1956 (Money laundering), 18 U.S.C. § 2331 (Extraterritorial jurisdiction over terrorist acts abroad against U.S. nationals), 18 U.S.C. § 2401 (War Crimes), 18 U.S.C. § 46502 (Aircraft Piracy).

## C. Substance and Analysis of The Military Extraterritorial Jurisdiction Act

### 1. Jurisdiction

The Act amends Title 18 of the United States Code, adding chapter 212. It creates Federal jurisdiction over criminal conduct by those individuals who accompany the Armed Forces, those who are employed by the Armed Forces, and over former active duty military personnel, when that conduct occurs outside the United States.

Section 3261 defines the proscribed criminal conduct as that which would be a felony if committed within the United States, describing the new crime as, "conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged within the special maritime and territorial jurisdiction of the United States."[188] Some of the special maritime and territorial jurisdiction offenses which are prosecutable felonies under the Act include arson,[189] various assaults,[190] maiming,[191] larceny, theft and receiving stolen property,[192] murder, manslaughter, including attempted murder and manslaughter,[193] kidnapping,[194] destruction of property,[195] money laundering,[196] rape, carnal knowledge with a female under age 16,[197] and several sex abuse offenses.[198]

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[188] 18 U.S.C. § 3261(a).
[189] 18 U.S.C. § 81.
[190] 18 U.S.C. § 113.
[191] 18 U.S.C. § 114.
[192] 18 U.S.C. §§ 661-662.
[193] 18 U.S.C. §§ 1111-1113.
[194] 18 U.S.C. § 1201.
[195] 18 U.S.C. § 1363.
[196] 18 U.S.C. § 1957(d)(1).

The persons subject to the Act are (1) those who are employed by or accompanying the Armed Forces outside the United States and (2) members of the Armed Forces and who are subject to the Uniform Code of Military Justice.[199] The first provision includes civilian DoD employees, DoD contractors and their subcontractors, and employees of contractors. · Excluded from the coverage are host nation nationals and those who are ordinarily residents of that nation. Although such an extension is conceivably arguable using the five principles of jurisdiction, particularly when basing jurisdiction on the status of the victim, this provision avoids offending the host nation and the international community. The phrase "accompanying the armed forces" includes dependents of active duty members who reside overseas with the member, dependents of civilian employees of the Armed Forces who reside overseas with the employee, and dependents of DoD contractors who reside overseas with the contractor. Once again, nationals and residents are excluded.[200] It is important to note that juveniles are also included in the term "dependents."[201] The second provision covers former military members who commit crimes overseas while on active duty, but have ceased to be subject to the Uniform Code of Military Justice due to separation from the military.

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[197] 18 U.S.C. §§ 2031-2032.
[198] 18 U.S.C. §§ 2241-2245
[199] *Id.*
[200] 18 U.S.C. § 3267.
[201] H.R. Rept. 106-778. These juveniles will be processed under the Federal Juvenile Delinquency Act, 18 U.S.C. § 5031-42.

Section 3261(b) prohibits prosecution by the United States if the host nation has or will prosecute the individual, unless the additional prosecution is authorized by the Attorney General or Deputy Attorney General. While such cases of double jeopardy may be infrequent, it will allow the United States to try an individual again, this time in a United States federal court, if there is a perceived miscarriage of justice and an inadequate accounting for a person's criminal activity. Section 3261(c) states that the Act will not deprive a military court-martial of jurisdiction over a crime that is properly triable in such a venue, allowing for concurrent jurisdiction in booth federal court and a military court. Section 3261(d) states that active duty members subject to the Uniform Code of Military Justice will not be tried under the Act unless they are no longer subject to the Code or the member committed an applicable offense with at least one other person who is not subject to the Code. This provision and Section 3261(a)(2) are important enactments that fill an additional gap in criminal jurisdiction – the case of the former active duty member who has been discharged from military service, has committed an extraterritorial crime, and is no longer subject to the Uniform Code of Military Justice. These civilians are now also amenable to United States criminal jurisdiction.

Additional work must occur before the Act is actually implemented. Before the new law takes effect, the Secretary of Defense must develop regulations for all branches of the service to govern apprehension, detention, delivery and removal of persons to the United States under the Act. The Secretary must also consult with the Secretary of State and the Attorney General in developing the new

regulations that implement the mechanics of the law. Finally, before the law takes effect, the Act requires a 90-day waiting period after the Secretary of Defense submits a report on the new regulations the Judiciary Committees of the House and Senate. However, when the law takes effect, it should prove to be an effective tool in enforcing discipline among civilian DoD associated individuals overseas while enhancing the reputation of the United States internationally as we are actually able to address civilian extraterritorial crime effectively for the first time. Prior to the Act, when the United States asked a host nation for jurisdiction over our civilians in cases of concurrent jurisdiction or exclusive foreign jurisdiction under a SOFA, we would do so with the knowledge that even if we obtained such a waiver of foreign jurisdiction, the remedies available to us in dealing with civilian crime overseas were negligible. The policy in those cases of maximizing United States jurisdiction may have benefited the host nation in that it did not have to use its resources or political capital to prosecute an American, but otherwise it benefited only the civilian who could suffer only administrative consequences, loss of employment, or forced return to the United States. The United States can now negotiate a request for jurisdiction in these cases in good faith, knowing that the wrongdoer faces criminal charges if appropriate.

Furthermore, all signatories to the Geneva Conventions are required to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."[202] This applies to American private citizens as well as military

[202] Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, T.I.A.S. 3364.

members. Additionally, the United Nations Model SOFA addresses the issue of civilians who accompany the armed forces, prescribing criminal jurisdiction over them.[203] As the United States increasingly participates in UN operations, the model SOFA's terms in this regard have been a problem since the United States had no criminal jurisdiction over its civilians accompanying the force. These situations repeatedly put the United States in a difficult position – both from the standpoint of bargaining power when we wanted to prevent another body or state from prosecuting our civilians, and also from a credibility standpoint. It would be naïve for the United States to believe that its lack of effective criminal jurisdiction over its DoD civilians was unknown to other nations as it sought to negotiate agreements with host nations in which it asked for jurisdiction over these individuals. In testimony before the House Judiciary Committee Crime Subcommittee on the Act, Roger Pauley said, "recent experience during peacekeeping operations indicates that host nations have become reluctant to enter into agreements with the United States ceding jurisdiction over United States civilian nationals accompanying the forces because of awareness that the United States lacks statutory mechanisms to exercise such jurisdiction."[204] The perceptions of these nations regarding the ability of the United States to police its own citizens are an important factor in the terms that the United States obtains in its bilateral SOFAs. The United States can now live up to its already existing

[203] Model Status of Forces Agreement for Peace-Keeping Operations, UN GOAR, 45th Sess., Agenda Item 76, UN Doc. A/45/594 (1990).
[204] ROGER PAULEY, Testimony Before the House Judiciary Committee Crime Subcommittee, March 30, 2000.

international agreements and can negotiate new agreements from a stronger position.

The new law should also withstand judicial scrutiny and be free of constitutional defect. Congress clearly has the authority to "regulate the conduct of its citizens and nationals outside the territorial boundaries of the United States,"[205] and to enforce its laws extraterritorially.[206] As Judge Cabranes pointed out in *Gatlin*,[207] the issue is not whether Congress can regulate the conduct of its citizens overseas and enforce its laws, but whether Congress has clearly stated its intent in a given law to do so. This Act is unequivocal in asserting Congressional intent to regulate and enforce conduct overseas. Moreover, "many federal criminal statutes already have extraterritorial effect and have survived legal challenge."[208] Nor will this Act undermine concepts of extraterritorial jurisdiction in international law; to the contrary, the Act is consistent with the five traditional grounds recognized in international law when asserting jurisdiction discussed earlier.[209]

**2. Safeguards from abuse**

While section 3261 provides the core jurisdictional guidelines in the Act, the remaining six sections set forth some of the procedural guidelines for the operation of the Act. Section 3262 addresses arrest and confinement; section 3263 deals with delivery to authorities of foreign countries; section 3264 places

[205] *Supra* note 153 at 211.
[206] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)
[207] *Supra* note 153 at 211.
[208] *Supra* note 184 at 48.
[209] *Supra* note 146.

limitations of removal; section 3265 addresses the initial proceedings; additional regulations are addressed in section 3266; and definitions are contained in section 3267.

Section 3263 provides for the arrest and commitment of alleged violators of the new law. However, only those designated and authorized by the Secretary of Defense will be able to arrest individuals. Furthermore, arrests must still be in accord with any international agreements in place. These provisions ensure that there will be no wholesale, unlimited actions to arrest individuals without proper authority. Additionally, the section requires probable cause to make an arrest, so mere suspicion will not trigger an arrest under the Act. Section 3262(b) also generally requires expeditious delivery of an arrestee to civilian law enforcement authorities in the United States, helping to ensure that no long and illegal detentions occur by military officials.

Section 3263 addresses delivery of the person to foreign officials if that country exercises its right to try the offender, stating that delivery may occur if proper under the host state's laws and a treaty or agreement authorizes such delivery. Once again, this section requires the delivery to be proper and authorized under applicable SOFAs.

Section 3264 protects a potentially innocent individual from arbitrary removal from the foreign country, only to be faced with the hardships of returning later at potentially great personal cost. The provision prohibits his removal from the country for trial elsewhere unless ordered by a Federal magistrate after a hearing, the person has a right to appear at a preliminary hearing under the

Federal rules of Criminal Procedure in the United States and does not waive that right, or the Secretary orders the prompt removal because of military necessity.

Due process protections are further required in the initial proceedings by Section 3265. If a person is arrested or charged under section 3261(a) of the Act, the initial appearance must be conducted by a Federal magistrate judge and may be conducted via telephone. The judge must make a probable cause determination as to whether an offense was committed by the person and if answered in the affirmative, must determine the conditions of the person's release before trial. If the hearings are conducted outside the United States, the accused is entitled to appointment of counsel, including a qualified military counsel. Throughout the process, safeguards are in place to ensure the system does not abuse the accused or violate due process rights.

**D. Alternative Options**

The Military Extraterritorial Jurisdiction Act of 2000 is by no means the only method by which the jurisdictional gap discussed in this paper could be solved. Numerous options exist ranging from the status quo, whereby the United States continues to use available administrative actions to address potentially serious and heinous crimes and other countries continue to have the option to step up and prosecute American citizens if they believe the crime warrants using their political and financial capital to do so. But both of these have left the exercise of justice by the wayside.

Adding the option to court-martial civilians in time of peace when they are deployed with the armed forces in time of peace is an option as has been discussed in this paper, and was included as a part of the original Senate Bill 768. But for now it appears that that concept has had its day for consideration, and Congress has elected to put that idea on the shelf for the time present.

One other option bears mention even if in passing, because it may be thrust upon the United States in the future regardless of the will of the United States. This option is the International Criminal Court.[210] Also known as the ICC, the treaty that established the Court was approved in 1988 at a United Nations Conference in Rome by delegates from 120 countries.[211] The treaty requires 60 countries to ratify it for the ICC to be permanently established.[212]

The treaty and the court have many detractors in the United States Senate, and it does not appear as though the United States will agree to ratify the treaty any time soon. The ICC will have jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.[213] Under Article 15, the prosecutor may initiate investigations, and if he concludes he has a basis to go on, he may submit his investigation to the Pre-Trial Chamber who may authorize further investigation. Article 28 makes the military commander criminally liable for actions of his troops. The United States did not support the ICC for several reasons. Among them was "concern that the numerous U.S. peacekeeping troops

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[210] THE ROME STATUTE OF THE CRIMINAL COURT
[211] BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, 1256 (3rd Edition, 1999).
[212] *Supra* note 210, Article 126.
[213] *Supra* note 210, Article 5.

abroad may be subject to politically motivated or unjust prosecution."[214] Furthermore, the United States took the position that principles of international law are violated by the fact that the treaty applies to states that did not ratify the treaty but took some kind of action within the territory of a state that did ratify the treaty.[215] Regardless of whether the ICC eventually is approved, the great majority of crimes that United States civilians who accompany the armed forces commit will not fall within the jurisdiction of the ICC due to the nature of the crimes. However, the potential exists for the ICC to take jurisdiction over certain United States civilian crime in the future, and this may occur even without United States action to ratify the treaty.

## CONCLUSION

Over the course of four decades, overseas military commanders have been frustrated with having the charge to maintain good order and discipline among their personnel and civilian members of the community, while the tools to handle civilian crime were withheld. Forty years have witnessed numerous victims of crime in United States overseas military communities expect that justice would be served for offenses committed by American citizens in their midst, only to watch as nothing more severe than administrative action was given in exchange for serious criminal acts. Despite a myriad of commentators and legislators who advocated closing the jurisdictional gap for civilian crime in United States overseas military communities, Congress was powerless to find a viable solution

[214] *Supra* note 211.
[215] *Id.*

to the problem. This history makes the Military Extraterritorial Jurisdiction Act of 2000 a significant piece of legislation on the landscape of American criminal law. It is not a perfect remedy to the jurisdictional gap discussed in this paper, but it is a significant step forward. Furthermore, it is perhaps even more significant when it is considered against the backdrop of forty years of paralysis in dealing with this problem. Finally, progress has been made. The inability of the United States to mete out justice to a segment of its citizens has been an embarrassment to the nation. It is even more so a national shame when considered in the context of where our criminal justice system broke down – in the territory of foreign states. The Act, if enforced judiciously and fervently where appropriate, will serve to restore confidence in this nation by our allies, will strengthen the ability of the United States to confidently and effectively negotiate SOFAs, and will give credibility to United States requests for jurisdiction over Americans abroad, knowing that criminal laws can be enforced. This Act may be the first step in addressing civilian extraterritorial crime, but it is nonetheless a significant step.